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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

NANCY BETH CRUZAN, by her parents and co-guardians, LESTER L. and JOYCE CRUZAN,
Petitioners

v.

DIRECTOR OF MISSOURI DEPARTMENT OF HEALTH, and ADMINISTRATOR OF THE MISSOURI REHABILITATION CENTER AT MT. VERNON,
Respondents

ON WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

Brief of the New Jersey Right To Life Committee, Inc.
National Federation of Catholic Physicians' Guilds
Coma Recovery Associations, Inc.
American Association of Senior Citizens, Inc.
New Jersey Advocates for the Disabled, Inc.
Nurses For Ethical Care

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INTERESTS OF AMICI

New Jersey Right to Life Committee, Inc.:

New Jersey Right to Life Committee, Inc. (NJRTLC) is a non-profit grass roots organization consisting of 42,000 member families and an affiliate of the National Right to Life Committee which represents hundreds of thousands of families across America on life issues. NJRTLC publishes a monthly newspaper entitled Right to Life News and holds state and local conferences dealing with the issues of abortion, infanticide and euthanasia. NJRTLC adamantly opposes the removal of life-sustaining nutrition and fluids from Nancy Beth Cruzan and all other persons. Our organization is dedicated to the protection and fostering of the most basic value of our society – life itself.

The National Federation of Catholic Physicians' Guilds:

The National Federation of Catholic Physicians' Guilds (NFCPG), founded in 1931, has member physicians in all 50 states. NFCPG is an active physicians' organization which meets annually, and publishes an outstanding journal. *The Linacre Quarterly*, to promote its interest in the ethics and philosophy of medical practice. NFCPG strongly opposes any decision which declares the use of food and fluids as anything other than ordinary modes of preserving life, and in no way can support the concept that they are medical treatment. NFCPG opposes any legislation justifying their removal from a non-dying person as a method to cause their death.

Coma Recovery Association:

Coma Recovery Association, Inc. (CRA) is a network of family support groups with chapters in New Jersey, Georgia, Florida, and New York. Initially organized in 1980, it was incorporated in New York in 1983. CRA has provided support and information to over 800 families of

former comatose patients. CRA is opposed to euthanasia in all its guises, and especially to any legislative and/or judicial decisions which would impose totally inappropriate guidelines on the length of treatment and/or the description of food and water as medical treatment or an extraordinary life-saving measure.

New Jersey Advocates for the Disabled, Inc.:

New Jersey Advocates for the Disabled, Inc. (NJAD) is an association of New Jersey citizens concerned about issues affecting the disabled. Incorporated in 1986, NJAD has provided educational material to the media and to the New Jersey Legislature. NJAD members have testified on legislative bills which might affect the disabled. NJAD feels that it is totally wrong to withhold food and fluid from a non-dying individual merely because there is a care problem. Obviously, the intent of removing food and water from a non-dying individual is to kill the person and it is an action which deprives him or her of his or her most basic right, the right to life.

American Association of Senior Citizens, Inc.:

American Association of Senior Citizens, Inc. (AASC) was in existence informally for a number of years before incorporation in New Jersey in 1988. AASC networkers in New Jersey, and several other states, have the purpose of furthering the welfare of senior citizens. AASC networkers sponsor and participate in bio-ethics conferences, and have testified in several states' legislatures on bio-ethics issues. AASC rejects the concept that food and fluids are medical treatment which may be refused to certain vulnerable patients. AASC fears the effects which an acceptance of that concept would have on nursing home patients, who are generally senior citizens.

Nurses For Ethical Care:

Nurses for Ethical Care (NEC) is a not-for-profit organization, presently in the process of incorporation. Because of their interest in the ethics of nursing practice, NEC members and networkers have lobbied the New Jersey Legislature on bills affecting nursing practice, have monitored many bio-ethics conferences throughout the United States, and have provided educational material to the New Jersey media and Legislature. NEC considers the removal of food and fluids from non-dying patients an act in violation of the moral principles affecting good medical conduct.

Letters from all the parties to the case below indicating their consent to the filing of this brief have been filed with the Clerk of the Court.

Cruzan:

Question Presented

Is a State required under the United States Constitution to authorize court-appointed guardians to cause the death of its incompetent and dependent ward by denying her food and fluids?

ARGUMENT

I. Permitting families and care providers to starve patients to death will have a devastating effect upon patient-physician and patient-institution relationships.

A Court decision which legitimizes the withholding or withdrawal of food and fluids from an incompetent severely handicapped non-dying person would have an immediate and direct impact on the fundamental patient and public assumption that care providers will preserve life and not treat certain human beings as expendable. It is said that there are currently 10,000 patients in the United States who are diagnosed as being in a "persistent vegetative state" (PVS). There are many thousands more who are demented, profoundly retarded and who appear cognitively unaware due to strokes and other brain injuries and who are often declared "vegetative". These people and generations of disabled persons to come will be affected by the decision rendered in this case before this Court. It is imperative therefore to examine the rationalization of euthanasia for the "good" of severely handicapped incompetent persons and to examine the medical bases for the diagnosis and prognosis of patients declared to be in a "hopeless" vegetative state.

Many cases of spontaneous recovery by persons deemed hopelessly and irreversibly "vegetative" raise many questions about the certitude of medical diagnoses of PVS. Studies showing improvement of PVS patients after electrical neurostimulation or by sensorimotor therapy indicate that undertanding of the PVS condition is unclear and that a gloomy prognosis is not scientifically warranted.

The Supreme Court must base its decision on sound constitutional theory and on the basis of universal legal principles. If a purported "right to die" prevails at a Constitutional level, it will result in endless case by case contradictions because of advances in medical technology. The facts in this case are very sad and are very

moving. The universal constitutional principles, however, which must be applied can not be varied from year to year as new technology not only sustains life but also cures the previously considered "hopeless" condition. The dramatic breakthrough in treating comatose patients successfully is analogous to the medical advances in treating the infant in utero. The Supreme Court in the case *sub judice*, as well as in the abortion cases, should not be forced "to act as a science review board." *Akron v. Akron Center for Reproductive Health*, 467 U.S. 416, 458 (1982).

A. The Diagnosis of "Persistent Vegetative State" Merely Indicates Outward Clinical Behavior and Does Not Indicate with Scientific Certitude the Interior, Cognitive or Sentient Capabilities of a Patient.

The proponents of euthanasia frequently attempt to classify profoundly disabled persons as not "really" persons because they lack a necessary quality of life. They conclude that such persons would be better off dead than to exist as a nebulous species of nonpersons.[1] The term "vegetative", a term which clearly and successfully has changed society's view of profoundly disabled persons, demonstrates the truth that "all social engineering is preceded by verbal engineering."[2] The term "persistent vegetative state" was first coined in 1972, when two neurologists wrote that "[the term PVS] describes behavior (and) . . . presumes neither a particular physioanatomical nor a specific pathological lesion."[3] Since the doctors who first labeled the condition admit that the

1. Lusthaus, E., *"Euthanasia" of Persons with Severe Handicaps: Refuting the Rationalizations,* 10 J. Assoc for Persons with Severe Handicaps, No. 2, 87-94 at 88. (1985).

2. Smith W.B., Mgsr., *Judeo-Christian Teaching on Euthanasia: Definitions, Distinctions and Decisions,* Linacre Quarterly, 27-42 at 32 (Feb. 1987).

3. Jennett, B. & Plum, F., *Persistent Vegetative State After Brain Damage: A Syndrome in Search of a Name,* Lancet, 734-739 at 736 (1972).

term PVS presumes no physioanatomical or pathological abnormality or lesion, then what does the term presume? It merely describes outward behavior observed at the bedside of the patient. "The vegetative state is homogeneous only with regard to behavior."[4] The "common denominator is the appearance of wakefulness without any *external* evidence of communication or complex behavior."[5]

Doctors Plum and Levy, who testified in the Nancy Ellen Jobes[6] case in New Jersey, said as recently as 1981 regarding PVS, "the clinical syndrome is poorly defined and limited data [describe] the pathological substrate, physiology, and natural history of the condition."[7]

The American Medical Association in its *amicus* brief claims that "Vegetative state patients may *react* to sounds, movements, and normally painful stimuli, but they do not *feel* any pain or *sense* anybody or anything". (AMA brief, p.8, 1.34, emphasis in the original). No empirical data is submitted in support of this observation other than citing the opinion of Dr. Ronald Cranford, 18 Hastings Ctr. Rep.

The AMA concedes that "there are currently no laboratory studies or tests that unequivocally confirm the diagnosis of a persistent vegetative state." (AMA brief, p.10, 1.23). *citing,* Cranford, R. 18 Hasting Ctr. Rep. at 29-30.

The AMA assertion that vegetative patients do not *sense* their surroundings is not supported by several

4. Boyle, M.E. & Greer, R.D., *Operant Procedures and the Comatose Patient,* J. of Applied Behav. Analysis, 3-12 at 10, (Spring, 1983).

5. Levy, D.E., Knill-Jones, R.P. & Plum, F., *The Vegetative State and Its Prognosis Following Non-Traumatic Coma,* Annals of N.Y. Academy of Science, 293-306, (1978).

6. *In re Jobes,* 108 N.J. 394, 529 A. 2d 434 (1987).

7. Dougherty, J.R., Rawlinson, D.G., Levy, D.E., Plum, F., *Hypoxischemic Brain Injury and the Vegetative State: Clinical and Neuropathological Correlation,* 31 Neurology (N.Y.), 991-997 (1981).

studies which show that humans born with merely the brainstem, and with virtually no cortex, do respond and can learn.[8]

Further, the AMA states, "The prognosis of a patient in a persistent vegetative state depends on a number of factors, primarily the cause and the duration of the condition" (AMA brief at 11, l. 3). It describes brain damage resulting from inadequate delivery of oxygen to the brain, hypoxia-ischemia, as one of the most common causes of persistent vegetative state and one in which patients do poorly. *Id.* at 10, 1.8 and 11, 1.6.

Dr. Cranford's certainty about the PVS state and the total lack of feeling and awareness is strange in view of a case he and three other neurologists together with an eighteen member ethics committee determined to be hopeless. *In the Matter of Guardianship of David Mack, Ward,* No. P6-80-771991 (Minn., Hennepin Dist.Ct. – P. Div. 1980). David Mack was a police officer who was diagnosed as being in a persistent vegetative state caused by hypoxia-ischemia, with no hope of recovery. Cranford said his "prognosis for higher cortical function is virtually zero". *Id.* The District Court of Hennepin County permitted removal of all life support, except food and water. David Mack, recovered consciousness after twenty-two months of PVS and indicated he was aware of his surroundings while in that state. He asked for a

8. Bernston, G.G., Tuber, D.S., Ronca, A.E., Bachman, D.S., *The Decerebrate Human: Associative Learning,* 81 Experimental Neurology, 77-88 (1983) (learning processes are not solely the product of the cerebral hemisphere, but reflect general integrative features of the human neuraxis; *See,* Francis, P.L., Self, P.A., McCaffree, M.A., *Behavioral Assessment of a Hydranencephalic Neonate,* 55 Child Development, 262-266 (1984); Aylward, G.P., Lazzara, A., Meyer, J., *Behavioral and Neurological Characteristics of a Hydranencephalic Infant,* 20 Develop. Med. Child Neurology, 211-217 (1978); Brackkett, Y., *Role of the Cortex in Orienting,* 5 Develop. Psychology, No. 2, 195-201, (1971); "Born Without a Brain: at 5, Boy Fools Med. Expert's", Star Ledger (Newark, N.J.), July 14, 1989, p. 25.

former private duty nurse named Terry whom he remembered caring for him. Minn. Trib., Jan. 28, 1982, at 1A and 13A.

Dr. Cranford, commenting on the recovery of Mack, stated "the reason they (PVS patients) never recover is that they are never given the opportunity to recover. We decide not to treat their complications and they die. Mack got much better nursing care for a longer period of time because the case got more publicity. If he'd been treated like everyone else, I don't think he would have stood a chance". N.Y. Times, June 27, 1982, Magazine, 29-40, 59, at 40. Clearly there is a great discrepancy between remarks and findings made in the Mack case and the position adopted by the AMA.

The AMA brief fails to report that the term persistent vegetative state is also applied to many patients who have sustained brain damage as a result of birth defects or from illnesses, as well as direct brain injury. Some studies indicate that profoundly retarded individuals were described as vegetative.[9] Dr. Ronald Cranford has likened the awareness of end-stage dementia of Alzheimer's patients to that of a persistent vegetative patient; the IQ is zero.[10] Cranford, who testified that "spoon feeding of Nancy Cruzan should be considered medical treatment"[11], also supports the removal of nutrition and hydration from severely and irreversibly demented patients, if nutrition is rejected by mouth. [12]

Withdrawal of food and fluids from patients diagnosed as being in a PVS state is problematic because of

9. *Supra,* at n.4.

10. Cranford, R., *Termination of Treatment in the Persistent Vegetative State,* 4 Seminars in Neurol. No. 1, 1-44 at 37 (March, 1984).

11. Cruzan transcript, p. 228.

12. Wanzer, S.H., et al. *The Physician's Responsibility Toward Hopelessly Ill Patients,* 310 N. Eng. J. Med., 955-99 (1984).

moral and ethical considerations and because the condition is poorly defined and there is a lack of diagnostic and prognostic validity. The AMA's position in this case and in the Webster case is inconsistent.

General counsel to the AMA recently commented that the AMA did not take a position as to *when* a fetus deserves protection in the case *Webster v. Reproductive Health Services* because:

> . . . It seemed presumptuous for the American Medical Association (AMA) to purport to represent the profession (or even AMA members) with a comprehensive position on abortion when physicians, like Americans in general, have widely divergent views on the issue. To a large extent, abortion is a *moral — not simply a medical or scientific — question* . . .
>
> The ultimate issue is when the embryo or fetus deserves protection — at viability, conception, or some other point. Medical science has no expert answer to that question, and physicians disagree on the answer. So we took no position on it. Johnson, K., *Webster v. Reproductive Health Services: the AMA Position,* 262 J.A.M.A., No. 11, at 1522 (Sept. 15, 1989).

Euthanasia of profoundly brain damaged patients by starvation or dehydration is also *a moral issue* as well as a medical or scientific question. In the case *sub judice*, the AMA certainly does not speak for the profession nor for all its AMA members.[13] Doctors from the West-

13. Bannon, A., *Rx: Death by Dehydration,* XII Human Life Rev., No. 3, 70-78 (Summer, 1986); Wertham, F., A Sign for Cain, 153-191, (1966); Chevlen, E.M., *Who Am I, What Am I Doing Here?: A Doctor Looks at Euthanasia,* Int'l. Review, 169-177 (Summer, 1988); Byrne, P. et al., *Physician's Responsibility Toward Sacred Human Life,* 53 Linacre Quarterly, 14-21 (Nov., 1986); Stanton, J., *The New Untermenschen,* Human Life Review,

chester County Medical Center in New York were forced to appeal to the highest Court in the state in order to provide food and fluids to a conscious non-dying stroke patient whose daughters objected to the insertion of a naso-gastric tube. *In the Matter of Mary O'Connor, Westchester County Medical Center, N.Y.*, 534 N.Y. S. 2d 886, 72 N.Y.2d 517, 531 N.E. 2d 607 (1988). Oct. 14, 1988 N.Y.

Unfortunate cases such as Mary O'Connor, who was not PVS but merely incompetent to make medical decisions, arise out of sweeping interpretation of state court decisions and AMA pronouncements regarding removal of food and fluids.

In the case of Carrie Coons, Justice Harris of the New York Supreme Court (Albany Co.) ruled that her feeding tube could be removed after she was described as being in an irreversible PVS state with no hope of recovery. The order was withdrawn when Coons, after approximately six months in PVS, sat up in bed, verbally communicated, and was able to partially eat and drink on her own after intense efforts by the nursing staff. "Right to Die Order Revoked As Patient in Coma Awakes", N.Y. Times, April 13, 1989, p. B 3, col. 5 and 6.

Dr. Mihai Dimancescu, President of the New York State Neurosurgical Society and Chairman of the Board of the Coma Recovery Association, commented on the 1986 statement issued by the seven member Judicial Council of the AMA on "Withholding or Withdrawing Life Prolonging Medical Treatment"[14] (The Council approved the withdrawal or withholding of nutrition and hydration from a terminally ill or an irreversibly comatose patient.) Dimancescu stated the guideline provides no definition of what constitutes adequate safeguards to

77-84 (1984); Jay, A., *Judge Ordered Me to Kill My Patient,* Med. Economics (Aug 10, 1987); O'Donnell, W.E., *Cost-Containment Makes My Patient My Enemy,* Med. Economics, (July 8, 1985).

14. AMA Council on Ethical and Judicial Affairs Statement released in New Orleans, LA, March 15, 1986.

confirm the accuracy of the diagnosis and that it is "dangerous". "When is Coma Irreversible? AMA Guidelines Debated", Med. Trib., May 28, 1986, 1, 32, 34 at 32.

Dimancescu, who in 1986 had treated more than 250 coma cases, reports that 35% are functioning independently; 57% are in varying stages of recovery; 4% showed no improvement and 4% died. *Id.* His opinion of the AMA Judicial Council's position is as follows:

> The ruling is too vague because it doesn't state what type of patient it applies to, the causes of the coma, or the standards of determining irreversibility. . . . I've seen too many people who were said to be cerebrally dead and survived. The quality of survival is unpredictable and the medical community is in no position to predict the outcome. That's why you are obligated to treat. . . . There is no prognostic index for every type of coma, the quality of diagnosis varies from hospital to hospital. *Id.*

Amici, the National Federation of Catholic Physicians' Guilds, believe that a physician who causes death by starvation and/or dehydration of any patient is no longer practicing medicine. The chairperson of the AMA Judicial Council recognized that not all physicians agree with the Council's statement and advised that if a physician is "uncomfortable with discontinuing treatment or withholding life support (food and fluids), he or she should not do it. . . ."[15] *Amici,* members of the medical professions, devote their lives to nurturing and caring for the unborn, newborn, handicapped, mentally ill, aged and the dying. The idea of denying a patient food and water is so repugnant to all their profession stands for, that they urge this Court to protect Nancy

15. Glass, J. and Ingram, B., "When is Coma Irreversible? AMA Guidelines Debated", Med. Trib., May 28, 1986, 1, 32, 34, 35.

Cruzan's fundamental right to life. The Court must block the dangerous path toward a general acceptance of euthanasia both voluntary or involuntary now. Traditional medical ethics which all people have come to expect and trust must be preserved.

II. Advances in neurology offer new treatments for cure of patients in a PVS state.

The understanding and treatment of diseases and injuries to the brain are perhaps the last frontier of medicine being explored. For many years patients with schizophrenia and depression were confined to institutions and were considered hopelessly demented. Institutions were "snakepits" and patients had hardly any civil rights. In the past ten to twenty years, psychiatrists have abandoned their previous Freudian orthodoxy and are successfully controlling over two thirds of persons diagnosed with schizophrenia with antipsychotic drugs or neuroleptics.[16]

There have also been great advances made in methods of bringing patients out of coma. Studies of various successful protocols are being done in Australia, in Japan and in the United States. If the Cruzan family prevails in this case, it may result in starvation deaths of thousands of patients whose families were permitted to withdraw basic care not knowing that new treatments are being developed. Physicians have an obligation to inform families of advances in medicine which would have import for their loved ones.

A. Scientific Studies Indicate that Some Patients in a Persistent Vegetative State Recover Consciousness When Treated with Electrical Stimulation.

Dr. T. Kanno, Chief Neurosurgeon at Fujita-Jakuen School of Medicine in Toyoake, Japan has reported the

16. Fuller Torrey E., M.D., Surviving Schizophrenia: A Family Manual, 111-112 (1983).

results of a 1987 study of dorsal column electrical neurostimulation (DCS) applied to group of four vegetative patients; of ten vegetative patients in 1988; and of twenty-three vegetative patients in 1989. All of these patients were "unable to communicate, move, recognize, eat and had double incontinence for a minimum of three months".[17] They all met the maximum time standard enunciated in the Appendix of the AMA and the AA of Neurology *amicus* briefs. A neurostimulator was implanted in the epidural space at C-2 of the spine and for 12 hours per day, mild stimulation was given with EEG and VIDEO monitoring.

In 1987, Dr. Kanno reported that three of four of the patients improved clinically, including a twenty-six year old male who was in a complete vegetative state for three years prior to being treated.[18] After four months, he followed verbal orders, could gesture, watch television, smile and show anger as well as other emotions. A thirty-five year old male was vegetative for nine months before electrostimulation. Two weeks later, his EEG improved and he responded to verbal orders, a month later he was watching television and expressing emotions. Dr. Kanno concluded that the clinical improvement and the EEG changes may be due to observed increased regional cerebral blood flow in the frontal and parietal lobes. The same phenomenon was reported by Dr. Y. Hosobuchi in another study.[19]

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17. Kanno, Tetsuo, et al., *Neurostimulation for Patients in Vegetative Status,* 10 PACE 207-208 (Jan.-Feb., 1987), Part II.

18. *Id.*

19. Hosobuchi, Y. *Electrical Stimulation of the Cervical Spinal Cord Increases Blood Flow in Humans,* 48 Appl. Neurophysiol, 372 (1985); Matsui, Toro, et al., *Beneficial Effect of Cervical Spinal Cord Stimulations (SCS) on Patients with Impaired Consciousness: A Preliminary Report,* 12 PACE, No. 4, 718-725 (April, Part II, 1989).

Dr. Kanno's second study reported in February 1988 involved ten patients in a vegetative state.[20] The patients ranged in age from twenty to seventy years of age; were eight males, two females; and were given DCS treatment after three months to three years after onset of the PVS condition. Dr. Kanno's results were: nine out of ten patients' EEG improved within 3 to 14 days after DCS; four of the ten patients showed good clinical improvement, and four others showed slight clinical improvement. They followed verbal orders within four months and opened their eyes two weeks after starting the neurostimulation. The blood flow increased by 20 to 40% not only in the cerebrum, but the cerebellum and brainstem. Finally, the neurostimulation enhanced the metabolism of catecholamines which resulted in the increased production of Dopamine and Norepinephrine among other chemicals needed by the brain. Kanno concluded that the neurostimulation increases blood flow, enhances catecholamine metabolism and improves the EEG resulting in the clinical improvement of patients in a vegetative state.

In 1989, Dr. Kanno's study of twenty-three patients diagnosed as vegetative published in April 1989 showed good clinical improvement in eight of the patients.[21] Six of the patients who showed good improvement received DCS after nine months in a coma. The other two who had a good recovery were in a coma thirty months prior to DCS treatment. In fifteen of the twenty three cases, the EEG improved after DCS therapy Dr. Kanno concluded that DCS must be continued for at least twelve

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20. Kanno, T., et al., *Effects of Neurostimulation on Reversibility of Neuronal Function: Experience of Treatment for Vegetative Status,* 16 Neurological Surgery No. 2, 157-162 (Tokyo Japan) (Feb. 1988).

21. Kanno, T., et al., *Effects of Dorsal Column Spinal Cord Stimulation (DCS) on Reversibility of Neuronal Function – Experience of Treatment for Vegetative Status,* 12 PACE, No. 4, 733-738 (April, Part II, 1989).

months to judge the effectiveness. "Improvement of 35% of the cases is much more than could be expected as part of spontaneous recovery".[22]

In a U.S. study in 1977 reported by Dr. R. Hassler, three patients who were in a comatose state recovered consciousness when electrodes were inserted in the brain below the cortex.[23] However, in two of the cases, consciousness only persisted while the electrostimulation was applied. The third patient retained consciousness, sat up, spoke and took part in the life of her family. Dr. Kanno has improved on Hassler's experiment by applying twelve hour electro-stimulation over a longer time period.

Recently other researchers have also become very hopeful about the potential for recovery of the human nervous system. The editor of *Advances in Neurology,* who recently devoted an entire volume to Functional Recovery in Neurological Disease, observed that ". . . . the outlook may not be as hopeless as traditionally assumed."[24] The AMA amicus brief notes that nerve cells deprived of oxygen die. Recent studies, however, indicate that the nervous system can overcome oxygen deprivation deficits, by sprouting new nerve fibers and rerouting messages.[25]

In a study involving animals whose spinal cords were cut half-way through, electrical stimulation

22. *Id.* at 735.

23. Hassler, R., *Basal Ganglia Systems Regulating Mental Activity,* 12 Int'l. J. of Neurol., 53-72, at 67-68 (1977).

24. Waxman, S., *Functional Recovery in Diseases of the Nervous System,* 47 Advances in Neurology, 1-7 (1988); Goldie, W., Price, R., *Recovery from 'Brain Death' with Absent Evoked Potentials,: Abstract,* 5 J. Clin. Neurophysiol. No. 4 at 354 (1988). (Functional neurologic recovery occurred in all seven patients despite profound clinical findings.)

25. Varon, S., et al. *Growth Factors,* 47 Advances in Neurology, 493-522 (1988)

brought about regrowth of the severed nerves. Twenty-five percent of the animals receiving neurostimulation also recovered their lost function. Control animals receiving no stimulation had no recovery.[26] Dr. F. Nottebohm, who showed that new neurons do form in certain adult animals, postulates that hormones may be used in brain-injured persons, to stimulate the growth of new neurons and neural connections to promote brain function.[27]

B. Scientific Data Indicates that Many Patients in a Persistent Vegetative State or Coma Recover Consciousness When Treated with Sensorimotor Stimulation

Another method which has brought about recovery from PVS is sensorimotor stimulation. In this therapy all five senses — smell, taste, hearing, sight and touch — are stimulated; and the patient is put through patterned movements — all with greatly increased frequency, intensity and duration.

Dr. E.B. Lewinn and Dr. Mihai Dimancescu studied two groups of severe comatose patients; all within the 3, 4, or 5 level on the Glascow Coma Scale.[28] One group of sixteen patients admitted consecutively to the hospital received intense sensorimotor arousal stimulation. A second group of fourteen admitted consecutively received no such stimulation. *All* of the sixteen stimulated

26. Borgens, R., Blight,A., McGinnis,M., *Behavorial Recovery Induced by Applied Electrical Fields After Spinal Cord Hemisection on Guinea Pig,* 238 Science, 366-368 (Oct. 16, 1987).

27. Kolata, G., *New Neurons Form in Adulthood,* 224 Science 1325-1326 (June 22, 1984); Bjorkland, A., et al., *Neuronal Replacement by Intracerebral Neural Implants in Animal Models of Neurodegenerative Disease,* 47 Advances in Neurology, 455-492 (1988).

28. LeWinn, G., Dimancesru, M., *Environmental Deprivation and Enrichment in Coma,* Lancet, 156-157 (July 5, 1978).

patients recovered from coma; twelve regained functional independence; eight of the twelve have no detectable deficit. The other four are progressing but show some focal physical deficit and behavioral disorder. Of the fourteen patients who received no stimulation, eleven died.

Other studies show that patients treated with sensorimotor stimulation improve the electrical activity in the brain as indicated by EEG results.[29]

A major controlled study of sensorimotor arousal of comatose patients is presently in progress in Australia. John Pierce who is analyzing the Australian statistics stated "a controlled study will be more readily accepted by the international medical community and that could mean more patients helped" Miller, *Hope for Coma Patients,* Med. World News, Feb. 25, 1985 at 68, col. 2, 69, entire page.

In the United States the National Institutes of Health is also conducting a 3.5 million dollar controlled study of sensorimotor stimulation for coma recovery, at the Medical College of Virginia, Richmond and Cumberland Hospital, New Kent, Va. Results after the second year of the five year study are not yet available. Capri, J., Med. Trib. Sep. 14, 1989, 3 and 16.

The AMA assertions concerning diagnosis and prognosis of PVS are premature in view of the fact that the results of these controlled studies are not yet available; moreover, the reports of the effectiveness of electrostimulation, and the studies indicating awareness and learning in humans with virtually no cortex do not support the AMA position. As Dr. Cranford remarked after Carrie Coons of New York recovered from a six

29. Weber, P., *Sensorimotor Therapy: Its Effect On Electroencephalograms of Acute Comatose Patients,* 65 Arch. Phys. Med. Rehab. 457-462 (Aug. 1984); Rosadini, G., Sannita, W., *Inter- and Intra-Hemispheric Topographic Analyses of Quantitative EEG in Patients in Coma,* 7 Research Communication in Psychology, Psychiatry, and Behav. No. 1, 97-107 (1982).

month PVS state: "It's a dramatic case—it shows you that you're basically never dealing with certainties here." [30]

III. A health care surrogate may not legally obtain permission to remove tube delivered food and water from a severely brain damaged person with "no hope of recovery" by seeking to impute to the patient an implied directive to caregivers to discontinue treatment deemed unwanted; nor may medicine abandon a sick incompetent person in need of treatment and care.

A. The Ethical Medical Art Has Limits and Cannot Rule In Advance of the Case.

We may conclude as a matter of common knowledge that medical science contains general principles, abstracted from individual cases. Scientifically, one can state in advance of the particular case that loss of a given amount of blood in proportion to a patients body weight will have predictable effects upon the organs of the body. But the art of medicine, based upon these general scientific principles, cannot rule in advance of the case because the art of medicine applies the general principles to the particular patient. Current scientific knowledge of the case and current diagnosis of the disease are necessary before a determination is made to give or withhold treatment. The art mediates the general and the particular and it is the physician's judgment which is either artful or not. Since medical practice is an art, to require a physician to accept a ruling made in advance of the concrete case is to require the physician to practice medicine unartfully – viz. incompetently. For a physician to acquiesce in a patient's advance directive is to

30. "Right-to-Die Order Revoked As Patient in Coma Awakes," N.Y. Times, Apr. 13, 1989, B-3, col. 5.

accept an irrational determination of his art. It is unprofessional and unethical to enforce by law any contract controlling medical practice in advance of the case. This statement covers Nancy Cruzan's alleged imputed "advance" wishes as well as the more general problem met with in written living wills. Autonomy, whatever it means, cannot include the meaning that a physician is obligated to respect that right by violating the canons of medicine. Furthermore, the state cannot be obligated to enforce pseudo-science in order to uphold an asserted right to autonomy or privacy.

B. Medicine Must Confine Itself to Known Cause-Effect.

The science of medicine is based upon cause-effect relationships in the domain of physiology. This is what makes medicine scientific.

Medicine treats diseases (anomalies & impediments) rather than illness (subjective complaints).[31] In principle, the chief responsibility of the health care professional is to ascertain whether a complaint stands in a scientifically recognizable relationship to a disease. The physician who performs a hysterectomy on a non-diseased patient for the purpose of attempting to relieve a psychological complaint (e.g., anxiety) is not operating within the domain of medical competence.

As an implication of the cause-effect relationship, while non-sapience of a patient generally is diagnosed as having physiological causes (and therefore as potentially treatable or not by the canons of medical science and its arts), there is no known medical science that can effectuate non-physiological ends (except, of course, coincidentally); quality of life, diminished anxiety on the part of the family and onlookers, economic solvency,

31. *Boorse, C., On the Distinction Between Disease and Illness, Contemporary Issues in Bioethics,* (edited by Beauchamp and Walters) 64-73 (1982).

etc., are good ends, but they are not necessarily the ends that can be effectuated by medical causality.[32] A medical practice which attempts to achieve ends outside the competence of medicine is unethical.

As Aristotle argued over two millennnia ago, in ethics we argue not about ends but about means:

> "We deliberate not about ends but about the means to attain ends: no physician deliberates whether he should cure, no orator whether he should be convincing, no statesman whether he should establish law and order, nor does any expert deliberate about the end of his profession. We take the end for granted, and then consider in what manner and by what means it can be realized."[33]

Here the question is not whether good ends are desirable, but the rationality of the means. It does not fall within the purview of medicine to bring about these non-physiological ends. One should rather seek an economist, a psychologist or some other specialist. A physician does not act *qua* physician when he or she performs, or deliberately fails to perform, a "medical" procedure to "cause" ends which stand outside the bounds of medical purpose.

Therefore, to ask or require physicians to perform actions leading to the death of a patient in order to effectuate spiritual or psychological ends is a violation of medical science and art. The state certainly has a stake in preventing violations of the practice of medicine. Guarding the integrity of the medical profession by the state has always been a major concern of courts dealing with these issues.[34]

32. Ibid., Chapter on "The Myth of Mental Illness"; Thomas Szasz.

33. *Nicomachean Ethics*, Aristotle, Book III 3 (Ancient)

34. *Matter of Conroy*, 98 N.J. 321 (1985).

Death is not a medical end, nor is any action which purposely brings about death a recognizably medical action.[35] Therefore, it follows, that to stop performing recognizably medical or nursing procedures, e.g., tube-assisted feeding, in favor of procedures which are not recognizably medical (assisting in causing the death of the patient) is a perversion of medical practice. What end would possibly justify actions which deliberately cause death? Quality of life? Does death bring about improved quality of life?

Chapter II of Lifton's book *"Euthanasia: Direct Medical Killing*, pp. 45-80, should give us pause about any legal system that permits health care professionals to drape non-medical activities and projects in medical rhetoric. This is, in Lifton's terms, a "pseudo-ethical" principle because, among other reasons, it is rooted in pseudo-science.

C. Autonomy, By Definition, May Not Be Exercised By An Incompetent Nor May It Be Exercised By Another.

Autonomy, from the Greek, means self-governing. This is, by definition, a contemporaneous state of affairs. Non-sapient patients are not and, by definition, cannot be autonomous.

> "There is an almost uniform agreement in the history of philosophy that a person who lacks critical internal capacities for self-rule in some organized fashion – and not mere freedom from external constraint – lacks something integral to freedom and control. Thus, in order to be autonomous, the person must be both free of external control and in control of his or her own affairs." (Beauchamp p. 27)

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35. Lifton, R. J., *The Nazi Doctors: Medical Killing and the Pyschology of Genocide*, (1986).

Statements which merely report wants, wishes, or other psychic facts such as "I don't want to be a burden to my family," or "I don't regard non-sapience as a life worth living," are not principles. Therefore, we should not adjudicate these claims or contests according to the wants or preferences themselves, but rather according to universal moral and legal principles. If, for the sake of argument, the principle of autonomy is that the individual ought to be left to determine his life for himself (and hence we are obligated to respect his wants and wishes), the problem is that non-sapience involves a change of status in which autonomy no longer obtains:

(1) The change of status removes autonomous capacity.

(2) Some issues inherently require contemporaneous judgment.

A citizen cannot exercise the voting franchise by designating a proxy to vote for him *in futuro*, should he become incompetent. Two reasons are important: (1) Current judgment capacity; and (2) Judgments about current matters. Simply put, the patient does not have a *right* to do anything while in the incompetent state. The patient does not have current capacity to thwart sound medical judgment or treatment for the reason that his or her status has changed.

A substituted decision maker's decision-making power is derivative and therefore lacking also. The unconscious incompetent patient becomes the most vulnerable of patients and comes under the protection of the state (should harm be directed from any quarter) while also becoming the object of our most sensitive solicitude. The same holds true of such things as the contracting of a marriage or the voting franchise. These require current judgment capacity and knowledge about current matters.

D. The Death of Nancy Cruzan Cannot Be Justified By Ethical Normative Prescripts.

Assuming for the sake of argument, without admitting the fact, that Nancy Cruzan made some kind of expression of medical care decision in the event of her future incompetency, fundamental ethical concepts of human conduct prevent society from acceding to an act designed to end her human life since the medical fact is that she is not dead and not immediately dying. At root here for consideration are norms of conduct upon which we may rely in a just society.

Basic to our current system of laws is the proscription against killing innocent persons, by individuals or the state. Where did that rule come from? Was it found to be in place somewhere geographically or in time, and was it thought by our predecessor judges or legislators to be a handy thing? No. The law condemning killing emanates from God (revealed) and is deducible by philosophical inquiry (reasoning). Nancy Cruzan's death may not be brought about by intentional starvation. The killing would be contrary to the moral law and ought to be contrary to positive law.

This discussion takes us into the polemic involving legal positivism and natural law. Legal positivism is a view of the law based upon observation rather than speculation or reason. The legislative and judicial process are seen as the making and interpreting of rules (laws) to govern society separated from considerations of ideals of justice and morals and relying upon empirical data.

Natural law concerns rules (laws) of human conduct discovered by reason, appealing to an ideal of justice, derived from nature, and harmonious with the eternal law. The problem with legal positivism is that it rebelled so violently against the abuses of the natural law proponents that it sank neck deep in quicksand with no means of extricating itself. To put the matter simply,

mankind is a composite of flesh and spirit with a connection to a Supreme Being Who is also supreme law giver. Whether we like it or not rules for society have to reflect this fact or we suffer the consequences.

Professor John C. H. Wu quotes from Professor H. Lauterpacht concerning all the gibes hurled against the natural law, as follows:

> "The abuse of the idea of the natural law in defense of causes both paltry and iniquitous has caused many to reject it with impatience. This is perhaps the principle reason why a practical reformer like Jeremy Bentham, a great Judge like Mr. Justice Holmes, and legal philosopher like Hans Kelsen — all believers in social progress — have treated the law of nature with little respect. However the rejection of an actually or potentially beneficent notion for the reasons that it may be and has been abused savours of a kind of realism which has often led mankind to defeat."[36]

Going further, he indicates that Sir Frederick Pollock had put his finger on the real cause of this misunderstanding, when he wrote:

> "If Bentham had known what the law of nature was really like in the Middle Ages, he would have to speak of it with more respect."[37]

Wu also invokes Cicero in defense of the legitimacy of natural law:

> "In his De Legibus, Cicero wrote: 'Even if there was no written law against rape at Rome in the reign of Lucius Targurmius, we cannot say on that account that Sextus Targurmius did not break that eternal

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36. Wu, J.C.H. *Cases and Materials on Jurisprudence,* American Casebook Series, 200 (1958).
37. *Id.* at 200.

law by violating Lucretia, the daughter of Tricipitimus! For reason did exist, derived from the nature of the universe, urging men to right conduct and diverting them from wrong-doing, and this reason did not first become law when it was written down, but when it came into existence; and it came into existence simultaneously with the divine mind. Wherefore the true and primal law, applied to command and prohibition, is the right reason of supreme Jupiter.' "[38]

Quoting from Professor H.C. Adams, Wu gives us additional wisdom from the words of Cicero:

" '. . . the study of law must be derived from the depths of philosophy, and by an examination of the human mind and human society principles may be discovered in comparison with which the rules of positive law are by [sic] trivial importance.' "[39]

If the judgment of this Court actually permits the destruction of human life under notions of individual autonomy, self-determination ("right to die" or "best interest,") while the patient is incompetent, then we would have to conclude that ideas of universal objective good are sacrificed to utilitarian, private ends incompatible with a long and noble history of justice developed in Western civilization. This Court is going to make a life or death decision for Nancy Cruzan and for society. Is human life in such a special category that universal moral/ethical principles must be applied? Or have we as a society reached the point where the governing law will give public currency to utilitarian, privately held values of doubtful root resulting in sanctioned conduct antithetical to our long standing cultural values? If the death of Nancy Cruzan occurs under the facts of this case, then the Court will be repudiating our Judeo-Christian

38. *Id.* at 19.
39. *Id.* at 8.

heritage. We will be a society adrift on an unfriendly and unchartered sea, not the society instituted by the founders who expressed openly reliance for our laws upon a Supreme Being Who was called upon to endorse their bold scheme; a Supreme Being Who was to guide them and their posterity in formulating and perpetuating a society based upon universal (and objective) ideas of law and justice. In such a society individual and community life could flourish in freedom and trust, trust that the laws would sanction conduct based upon a system of universal principles of ethics philosophically enunciated at least as far back as Socrates.

It is no satisfactory rejoinder to assert that failing to give expression to Nancy's alleged will to seek death (or the will of her family) would evidence the opposite of freedom. The reason is that endorsing conduct which violates ethical norms is destructive of society and substitutes license for freedom. When universal concepts of justice are no longer the standard, strong tyrants appear who dictate conduct based upon subjective expressions of what is good and acceptable. History has produced enough of those to convince us that the threat is real and the consequences too awful to contemplate.

IV. A citizen's preference must be subject to the state's interest in the protection of life of all of its citizens.

God spoke, and these were His words ". . . Thou shall not kill." Exodus 20

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are *Life*, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed." Declaration of Independence

The State, under our belief in what government of the people, by the people and for the people should be, properly exercises the authority it receives from our Creator when it operates for the benefit of the governed. The guarantees to its citizens such as life and liberty are not guarantees unless the State has the power to protect these rights.

As our form of government has expanded the protections we afford individuals from the state, these protections do not give individuals leave to do whatever they wish. The actions of individuals must always be subject to the common good. So the State has enacted a broad range of rules, regulations and restrictions on individual liberties under the police power to protect the public health, public safety and public welfare.

The general welfare or the State's interest is paramount to the individual in numerous applications. In areas of public health, disease control and medicine, the power has long been recognized by the Supreme Court.[40]

The States have ordered blood transfusions over parents' religious convictions.[41] The state regulates school attendance, forbids child labor and prevents child abuse. If there is a threat to the general good by a particular individual's assertion of a right, it may not be allowed, no matter how strongly held or allegedly justified.

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40. *Barsky v. Board of Regents*, 347 U.S. 442 (1954); *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905); *Leisy v. Hardin*, 135 U.S. 100 (1890); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1954); *Berman v. Parker*, 348 U.S. 26 (1954); *H.P. Hood & Sons, Inc. v. DuMond.*, 336 U.S. 565 (1948).

41. *People ex rel. Wallace v. Labrenz*, 411 Ill. 618 (1952); *Morrison v. State*, 252 S.W.2d 97 (CA 1952); *State v. Perricone*, 37 N.J. 463 (1962); *Hoener v. Bertinato*, 67 N.J. Super. 517 (1961); *In re Santos*, 16 AD2d 755, appeal dismissed 232 NYS2d 1026 (1962); *In re Clark*, 21 Ohio Op2d 86 (1962); *John F. Kennedy Memorial Hospital v. Heston*, 58 N.J. 576 (1971).

The State has an interest in preserving the lives of its citizens even if the life the State is trying to protect is that of a citizen who wants to end his or her own life. If an individual wishes to choose death instead of life, the State's interest in the individual's life and its protection for the common good of all its citizens is not altered.

Therefore, the State's interest in life remains the same no matter what the particular individual's wishes, religious views or particular situation. Physical or mental handicap, age, position in society, or wealth has no effect on the State's interest. It does to the individual concerned, but not to the State's interest.

If the interest of the State in the life of its individuals is based on subjective judgments, the question asked must be – relative to what? The legal debate in America has focused too much on specific situations and not enough on the fundamental issue which is the State's interest in the protection of life.

If Nancy Cruzan is alive and not dead, then the State of Missouri has an interest in her life. If the State of Missouri wishes to sustain her life, as it wishes to do for all its citizens, it should be able to give her nourishment and heat and shelter until her natural death. Nancy Cruzan's quality of life should make no difference in the State's interest in protecting her.

Even if Nancy Cruzan regained consciousness and said she wanted to die, this would not change the State's interest in her life. If the State of Missouri wishes to sustain the life of its citizens by sending those who try to commit suicide for mental and medical help and if the State wishes to punish those who assist suicide by statutory police power, it should be able to.

If the State's interest in life is paramount, then even if Nancy Cruzan feels as though death would be her best option, she should forego death for the interest of the common good in preserving life. We believe that our "State" should be able to protect those who need their lives protected the most – the mentally insane, the

physically handicapped, the babies, the elderly and those unable to speak for themselves.

The State of Missouri has not asserted an evil interest but a good interest — an interest in life. Missouri's interest should not be overruled by the federal authority vested in the Supreme Court, but sustained.

CONCLUSION

The Court should affirm the decision of the State of Missouri since the State legislature has deliberated and decided that nutrition and fluids should not be removed or withheld from any of its citizens. Euthanasia of the severely disabled by starvation and dehydration is cruel and morally and medically unethical. This Court must protect the thousands of vulnerable persons who are allegedly "vegetative". Recent scientific studies refute and contradict many of the premises of the AMA *amici,* regarding the alleged irreversibility and hopelessness of PVS patients.

This Court's Ruling should reflect the reality of the practice of medicine, the melding in each case of the contemporary science of medicine and the physician's artful application of science to the case as it presents. Any deviation from this reality is pseudoscience and unethical art.

Additionally, the Court must reexamine the harmful effects of past attempts in jurisprudence to reach results directly bearing on life and death issues divorced from consideration of ethics, morals and universal norms deducible by reason.

According to Missouri state law, Nancy Cruzan is not dead, she is alive. Much has been made by Petitioners of Nancy Cruzan's persistent vegetative state. But Mrs. Cruzan is not a vegetable or a thing, she is still a person. Petitioners basically argue that the person, Nancy Cruzan, is dead and that modern technology has surpassed the ability of the State of Missouri to keep up

with medical facts. To that end, some factual liberties are taken by Petitioners in the name of medical facts which are not facts at all and are not supported by the record, e.g., How do Petitioners know Nancy Cruzan doesn't think?

If Nancy Cruzan's life continues to be maintained by the "State", she will not live forever. She will die a natural death. The question is whether the State should wait until she dies a natural death or whether the State has waited too long already and it's time to starve and dehydrate her to death. The State of Missouri does not advocate, condone or allow the taking of another's life by removing food and water.

Amici urge the Court to allow Missouri to exercise its interest in life to continue Nancy Cruzan's life until her natural death.

For the foregoing reasons, the Petition should be denied, and the decision of the Supreme Court of Missouri should be affirmed.

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